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Abstract 42 IA 34

No.11692 Publish Abstract Only Agenda No.

7/65
23

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, FIRST DIVISION

OCTOBER TERM 1962.

ERVIN MOHR, Administrator of the Estate of FRED GROSS, deceased, Plaintiff- Appellant

vs.

ARTHUR R. PARLEE, d/b/a/ Licondo Hotel Defendant- Appellee

Smith, J.:

An octogenarian filed his suit against the defendant to recover damages sustained when he slipped or fell on a stairway in the hotel operated by the defendant under lease. Plaintiff had been a resident of the hotel for several months and it was his practice to use the elevator to reach the third floor and his room but he generally used the stairway to descend. He was quite active for his age, worked and had been ailing somewhat for about a month before his fall. He died from natural causes a few months after the institution of the suit and his administrator was substituted as party plaintiff. A jury trial resulted in a not guilty verdict, judgment was entered on the verdict and post-trial motion was denied. This appeal followed.

In seeking a new trial in this Court the plaintiff first complains of the refusal of the trial Court to admit into evidence proof of statements made by the defendant after the accident that he had re-tacked the carpeting on the stairway and increased the lighting by the use of 25 watt bulbs

instead of 15 watt bulbs. Loose and defective carpeting, inadequate lighting and want of a hand-rail on one side of the stairway were among the acts of negligence charged in the complaint. The statements were made to plaintiff's attorney in an interview after the accident. The second point relied on by the plaintiff is the refusal of the trial Court to permit a interrogation of the jurors on voir doir examination as to their relationship to certain insurance companies. These are the only two points briefed or argued in this Court.

Plaintiff contends that these admissions of repair after the event are admissible to show ownership or control of the instrumentality causing the damage. That such evidence is not admissible for the purpose of establishing fault or negligence and the reasons for the rule are cogently stated in Cleary's Handbook of Illinois Evidence, page 59, Par.4.23 as follows:

> " Evidence of precautions taken after an accident are inadmissible as admissions of negligence or fault in causing the accident for reasons similar to those excluding offers of compromise. First, the taking of the precaution may be motivated by a desire to prevent a repetition of the accident and thus in fact not be an admission of negligence in not taking the precaution earlier, and, second, people should not be discouraged from taking such corrective steps by admitting evidence thereof as an admission. Hodges v. Percival, 132 Ill.53, 23 N.E.423".

The ownership and control of the premises was not an issue in the case. The complaint charged the defendant with operating the hotel and this was admitted in the answer. When testifying under Sec 60 C.P.A. as an adverse witness the defendant said: " I am the sole proprietor and manager of the hotel which I operate on a lease." The Court instructed the jury than "an innkeeper or hotel proprietor has a duty to his patrons to provide reasonably safe and reasonably suitable hallways and stairways in the hotel which he operates."In addition, through

one of those quirks inherent in the trial of a case the plaintiff had the benefit of a portion of the very evidence which he now says was excluded. Defendant was asked this question by plaintiff's counsel concerning statements made to the Counsel after the accident:

> " Did you also state in words or substance at that time and place before I tacked down the carpet at that point the carpet was somewhat loose?"
>
> Answer: I did"

Motion to strike this question and answer was made in chambers and the Court indicated that the motion would be allowed and the question and answer stricken. The record fails to show that this was ever done in the presence of the jury or that the Court was ever requested to advise the jury to disregard the question and answer. In this state of the record the plaintiff's suggestion that the jury might have thought it was the duty of the owner of the building to make repairs and that the avidence was admissible to remove such a thought from the jury's mind is patently vacuous. The issue of ownership and control was never an issue in the case. It was admitted.

Prior to the trial the plaintiff filed his motion for leave to inquire of the jurors on their voir doir examination of their relationahip, and that of their relatives and friends,to insurance companies. The motion was denied and the leave refused. It was stipulated for the record that Bituminous Casualty Company of Rock Island was the insurance carrier of the defendant and was providing the defense. The motion set forth that there were four automobile insurance carriers in Freeport and in Stephenson County with a large number of employees, stockholders, agents and adjustors in that City and County. The supporting affidavit of plaintiff's counsel states:

> "that deponent has talked to many residents of the County concerning their attitude toward persons

> who file lawsuits as a result of damages sustained and believes that there are numerous individuals in Stephenson County, Illinois, who by reason of some connection or association, either directly or indirectly, through a friend or relative of individually, with automobile liability insurance companies are defense minded and have a prejudice against persons who file lawsuits for damages alleged to have been sustained as a result of an automobile accident.'

We are of the opinion that the trial court properly denied the motion and refused the request on the record before us.

It may be here observed that the insurance carrier in the case at bar was not one of the Stephenson County cOmpanies. The affidavit and motion are silent as to the existence of any employee, agent, stockholder or adjuster of Bituminous in Stephenson County. The affidavit by its own language limits the charge of prejudice to suits arising out of automobile accidents. The record is silent as to whether any of the twelve jurors or members of their families were in fact employed by any insurance companies. In discussing the case of Mithen v. Jeffrey, 259 Ill. 372, 102 N.E. 778 our Supreme Court said, in Smithers v. Henrique, 368 Ill. 588 at page 596-7, 15 N.E.2d 499 at page 504:

> It is to be noticed that the question did not indicate an attempt to ascertain whether the juror was interested, financially or otherwise, in the COMPANY MENTIONED. (capitalization ours). There was nothing before the Court to indicate that the company was the insurer of the defendant or was defending the suit. The absence of any such showing of good faith brought forth our pronouncement that the purpose was to inform the jury the defendant was insured and that it was improper. We held that an examination to ascertain whether a juror is interested can be conducted in such a manner as will not lead him to understand the defendant is insured and without substantial interest in the case."

We think the foregoing comment is apropos and decisive of the case at bar. None of the cases cited have gone beyond an examination of the juror as to his interest in the company insuring the defendant and defending the suit. In those cases

where the inquiry has been approved-- and we do not repudiate them--the requirement that the inquiry was in good faith was met. The circumstances shown by this record fall far beyond the perimeter of those holdings. We, therefore, conclude that the action of the trial court was correct.

We should say in passing that the facts shown by this record on the questions of due care of the plaintiff and the negligence of the defendant were properly left to the jury and their determination should not be disturbed. The judgment of the trial court should be and it is hereby affirmed.

Affirmed.

McNeal, P.J. and Dove, J. concur.

48757

42 IA 35

MINNIE JAMISON,	)	
	)	
Plaintiff-Appellant,	)	APPEAL FROM THE
	)	
vs.	)	MUNICIPAL COURT OF
	)	
COLUMBUS & CHICAGO MOTOR FREIGHT, INC., a Corporation, and ERNEST DAVIS,	)	CHICAGO.
	)	
Defendants-Appellees.	)	

MR. JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a jury verdict and judgment in favor of defendants. A new trial is sought on the sole ground that the verdict was contrary to the manifest weight of the evidence.

It is recognized that while this court should approach with caution the reversal of a judgment based upon a jury verdict, nevertheless it is the duty of this court to do so when it is clearly apparent that the verdict was contrary to the manifest weight of the evidence. (Eilers v. Chicago Transit Authority, 2 Ill. App. 2d 233, 236; Carter v. Geeseman, 303 Ill. App. 280, 284.)

The vehicles of the parties came into collision at the southwest corner of Lake and Halsted Streets in Chicago at 3 P.M. on a misty, rainy day in March. Plaintiff was driving a passenger car and defendant Davis was driving a 45-foot trailer truck belonging to his employer, the corporate defendant. Both were travelling east on Lake Street and both attempted to turn south on Halsted Street. In the process plaintiff's car was squeezed between the rear part of the truck trailer and a post of the elevated structure located at the southwest curb corner of the intersection. Plaintiff was injured.

As to the foregoing recital of facts, the witnesses were in agreement. As to how the vehicles reached the position described, there is a wide variance in the testimony.

Plaintiff testified that she was driving in the right-hand traffic lane and had stopped at the intersection for a traffic signal; that when the light changed to green she started to turn the corner to the right when the truck also turned in that direction from the traffic lane on her left, and her car was squeezed against the post.

A pedestrian witness for plaintiff testified that plaintiff was travelling east in the curb lane and turned right without stopping at the intersection; that defendants' truck "came alongside and went in front of the car faster than the car was going and * * * caught the front end of the car and pulled it into the pillar that holds up the Lake Street 'L.'"; that both vehicles were attempting to turn right onto Halsted Street, with the truck on the left of the automobile.

Defendant Davis testified that he drove in the curb lane as he approached the intersection; that the truck's turn signals were indicating a turn to the right; that he had completed his turn onto Halsted Street with all but about five feet of the trailer when plaintiff, coming from the rear, attempted to turn between the truck and the post and there was not enough room; that he felt the impact and stopped the truck; that at the time of the impact he was going 3 or 4 miles per hour.

Plaintiff also testified that she was employed as a packer at Benson Fish Company, and as a result of the accident had missed four weeks' work. Her employer's superintendent of production testified that during that four-week period plaintiff had missed work only on the day after the accident.

From this record it appears that the conflict among the witnesses on critical questions of fact was determined by the jury through exercise of its proper function of assessing credibility. We cannot say that a contrary result is required by the evidence or that the jury's verdict is "palpably erroneous and wholly unwarranted." (Vasic v. Chicago Transit Authority, 33 Ill. App. 2d 11, 11e.) We must, therefore, affirm the judgment of the trial court. (Jackson v. Gordon, 37 Ill. App. 2d 41, 44; Chicago v. Atkins, 19 Ill. App. 2d 177, 182; Romines v. Illinois Motor Freight, Inc., 21 Ill. App. 2d 380, 385; Ney v. Yellow Cab Co., 2 Ill. 2d 74, 84; Paul Harris Furniture Co. v. Morse, 10 Ill. 2d 28, 42.)

AFFIRMED.

BURMAN, P.J., and MURPHY, J., concur.

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48778

42 IA 36

LILLIAN V. MOORE,
Plaintiff-Appellee,
vs.
J. EDWARD JONES,
Defendant-Appellant.

APPEAL FROM THE
COUNTY COURT OF
COOK COUNTY.

MR. JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

On December 27, 1956 this court reversed an order of the County Court denying defendant's motion to vacate a default judgment against him for $1,000. The cause was remanded with directions to open the judgment, and to give defendant leave to defend, with the judgment to stand as security, and with the execution thereunder stayed until further order of court. The trial court was also directed to assess against defendant a reasonable attorney's fee to be paid to plaintiff as a condition for the entry of such order. (Moore v. Jones, 12 Ill. App. 2d 488, 496.) The decision of this court became final when neither party petitioned for rehearing.

The mandate of this court was never filed in the County Court.

On May 7, 1958 plaintiff filed a petition in the County Court on the basis of which a judgment of $300 was entered against defendant for attorney's fee; stay of execution on the original judgment for $1,000 was terminated; and execution was ordered to issue on both judgments. Defendant appeared specially for the limited purpose of contesting the court's jurisdiction, and asked that the order of May 7, 1958 be vacated. This petition was denied on February 9, 1962 and defendant has appealed. Plaintiff has not appeared on this appeal.

Defendant advances the sole contention that, since neither party filed this court's mandate, the County Court was never reinvested with jurisdiction over the cause, and was, therefore, without authority to enter the order from which this appeal has been taken. We agree.

Section 88 of the Civil Practice Act is controlling. (Ill. Rev. Stat., Ch. 110, § 88.) It provides in pertinent part:

> (2) If any cause is remanded for a new trial or hearing, the reviewing court shall issue its mandate reversing and remanding the cause directly to the trial court. Upon the filing of the mandate in the trial court the cause or proceeding shall be reinstated therein, upon 10 days' notice being given to the adverse party or his attorney. * * *
>
> (3) No new trial or hearing shall be had by reason of the reversal of any judgment, order or decree, unless the mandate is filed in the trial court within 1 year after the judgment, order or decree of the reviewing court has become final either through the denial of a petition for rehearing or the expiration of the time within which a petition for rehearing might have been filed.

When a year elapsed after this court's decision became final, and the mandate had not been filed in the County Court, that court was wholly lacking in authority to enter the order of May 7, 1958. (Continental Paper Grading Co. v. Howard T. Fisher & Associates, Inc., 13 Ill. App. 2d 1; Busser v. Noble, 32 Ill. App. 2d 181.) The order of February 9, 1962 denying defendant's petition to vacate was, therefore, in error, and is reversed. The cause is remanded to the County Court with directions to vacate the order of May 7, 1958.

REVERSED AND REMANDED WITH DIRECTIONS.

BURMAN, P.J., and MURPHY, J., concur.

Publish abstract only.

42 IA 2d 84

No. 48972

JOSEPH SERPE, Plaintiff-Appellee,	)	
v.	)	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.
LUIS RIVERA, Defendant-Appellant.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT:

Plaintiff in this case obtained a judgment by default against defendant for the sum of $1500 on December 22, 1959 in a personal injury suit involving a collision between two automobiles. In 1960 defendant filed a petition in bankruptcy, listing the judgment as a liability, and received an order of discharge thereon from the United States District Court in Chicago. In 1962 plaintiff commenced garnishment proceedings against defendant to enforce collection of the judgment. Defendant thereupon filed a motion, setting forth his petition in bankruptcy and that an order discharging him from said judgment had been entered by the United States District Court in Chicago in cause No. 60 B 6002, and petitioned the Municipal court for an order prohibiting plaintiff from pursuing any further legal action to enforce the judgment. The court denied the motion, and an appeal was taken by defendant to this court.

No brief was filed by plaintiff. It is indicated by defendant that the reason for the trial court's decision was that the complaint in the personal injury suit included a wilful and wanton charge. The complaint

contained seven charges of ordinary negligence and then, as the last charge in a group of eight, averred that defendant negligently operated his aforesaid motor vehicle in a "malicious, wilful and wanton manner, and with a conscious and reckless indifference to the rights of others then and there present." No facts were stated in the complaint to support the charge. The charge of malice, stated in these general terms and included with charges of simple negligence, is not sufficient to sustain a judgment as one based on "malicious, wilful and wanton" conduct.

The judgment is reversed and the cause is remanded, with directions to allow defendant's motion for a permanent stay of execution.

JUDGMENT REVERSED AND CAUSE REMANDED, WITH DIRECTIONS.

Dempsey, P.J., and McCormick, J. concur.

Abstract only.

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48714

MELVIN CLINE, Appellant and Cross Appellee, v. KIRCHWEHM BROS. CARTAGE CO., INC., a Corporation, Appellee and Cross Appellee, and M. A. SOPER CO., a Corporation, Appellee and Cross Appellant.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Melvin Cline brought a suit in the Superior Court of Cook County against Kirchwehm Bros. Cartage Co., Inc. and Robert H. Rohdenburg, who was subsequently dismissed out of the suit. Plaintiff was granted leave to amend his complaint, making M. A. Soper Co., a corporation, an additional party defendant. The suit sought damages based upon personal injuries suffered by the plaintiff, who was struck by a Kirchwehm truck while he was crossing a street from behind Soper's truck, which was parked on the wrong side of the street. An interrogatory was submitted to the jury as to whether the occurrence in question was proximately caused by contributory negligence of the plaintiff, and the jury answered in the negative. The jury returned a verdict against both Kirchwehm and Soper in the sum of $30,000, and judgment was entered on the verdict.

The plaintiff filed a post-trial motion complaining that the verdict was inadequate and seeking a new trial on the issue of damages. Kirchwehm filed no post-trial motion. Soper

filed a post-trial motion asking the court to set aside the special finding of the jury and the verdict, and to grant judgment in its favor notwithstanding the verdict, or in the alternative, to order a new trial. The court overruled all the post-trial motions. The plaintiff filed an appeal. Soper filed a cross-appeal.

The plaintiff's theory here is that the damages awarded him were so grossly inadequate as to entitle him to a new trial on the issue of damages alone, and that the verdict on damages resulted from the jury's failure to take into consideration the proper elements of damage, and from the highly prejudicial conduct of the attorneys for the defendants during the trial. Soper in its notice of cross-appeal appeals from the judgment and the denial of its motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial. It is not appealing from the denial of its motion to set aside the jury's answer to the submitted interrogatory. The brief of Soper filed in this court in support of its cross-appeal concludes: "There is no evidence that M. A. Soper Co. was guilty of any negligence. There is no evidence that the stopping of M. A. Soper Co's truck was a proximate cause of the injury. Plaintiff utterly failed to prove his own due care. We respectfully submit that the judgment against M. A. Soper Co. should be reversed." The only question urged by Soper before this court was whether the trial court erred in failing to enter a judgment notwithstanding the verdict.

From the record it appears that Cline was 56 years old on December 11, 1953 and was then employed as a

manufacturer's representative for Consolidated Tool and Die Company. He had been so employed for four months in 1953 and in soliciting business he drove his own car. On December 11, 1953, while working in his capacity as manufacturer's representative, he called upon a customer, the Chicago Molded Products Company, which was located in the 1000 block of North Kolmar Avenue, in Chicago, on the west side of the street. Cline had parked his car in a parking lot on the east side of the street. The Chicago Molded Products Company had a loading dock, access to which was through a locked gate. The driver of the Soper truck had been traveling north, and such traffic would properly be on the east side of the street. He stopped the truck on the west side of the street in order to enter the office of the Chicago Molded Products Company plant so that he could open the gate to the dock. His intention was then to back the truck, enter the loading dock and take on a load. After leaving the office of the Chicago Molded Products Company, Cline walked north on the west side of the street until he reached a point just south of the rear end of the truck. He then started to walk east to cross the street, and after he had passed the rear of the Soper truck he saw the Kirchwehm truck coming from the north and was struck at that instant.

At the place of the accident the street was twenty feet wide. The width of the Soper truck was eight feet. There is testimony in the record that the front wheels of the Soper truck were on the sidewalk on the west side of the street, which would place the truck at an angle. The Kirchwehm truck was being driven south. In order to get by the Soper truck it

had to turn into the lane of traffic on the east side of the street. The driver of that truck testified that when he was going south and saw the Soper truck parked on the west side of the street facing north he moved his truck over to his left, which took him over the center line of the street, and that he took his foot off the gas and rested it on the brake lightly to clear this parked vehicle. The driver of the Soper truck testified that at the time of the accident he was sitting in his truck, that when the Kirchwehm truck went by he heard the screech of brakes, that he heard no horn, and that the truck as it approached him was going at 15 to 20 miles an hour. He also testified that he did not recall whether any part of his left wheels were on any part of the sidewalk.

The first question to be determined is whether the trial court erred in denying Soper's post-trial motion for judgment notwithstanding the verdict.

The rule which the court should apply in determining whether the entry of a judgment notwithstanding the verdict under the provisions of the Practice Act should be allowed have been spelled out many times in the decisions of our courts. The rule is that in determining such a motion the court must apply the same rule which it would apply on a motion for a directed verdict. In one of the latest cases dealing with this question, Gray v. Terminal Railroad Association of St. Louis, 37 Ill.App.2d 376, 185 N.E.2d 700, the court said:

> "In considering questions relating to motions for directed verdict at the close of all the evidence, and for judgment notwithstanding the verdict, the

> Court must consider the evidence with all reasonable inferences arising therefrom in favor of plaintiff (Bales v. Pennsylvania R. Co., 347 Ill App 466, 107 NE2d 179; Gibson v. Nenne, 2 Ill App2d 158, 118 NE2d 788)."

Also see Stroyeck v. A. E. Staley Mfg. Co., 26 Ill.App.2d 76, 167 N.E.2d 689.

In the instant case the questions presented were whether the defendant Soper was guilty of negligence proximately causing the injuries and whether the plaintiff was guilty of contributory negligence.

Soper argues that even though the street at the place where the Soper truck was stopped was posted with signs forbidding parking at any time, the defendant Soper was not "parking" inasmuch as the provisions of paragraph 116a(c) of chapter 95-1/2, Illinois Revised Statutes, 1953, states that "parking" does not mean the standing of a vehicle temporarily "for the purpose of and while actually engaged in loading or unloading," and the same provision appears in the Chicago Municipal Code. Soper cites various cases in support of its contention. It argues that the fact that at the time of the occurrence the driver went into the Chicago Molded Products Company solely for the purpose of opening the dock door so he could back the truck in to be loaded such stopping was in effect a temporary stop for the purpose of actually loading merchandise, and cites cases in support of that contention. Soper, however, neglects to observe that the stopping of the truck in the place in question disobeyed the rule set out in two ordinances. It was parked in a place where parking was not permitted, and it also was parked on the wrong side of the street. Had the truck been parked on the proper side of the street the cases cited by Soper would help its contention. None of them would excuse Soper's conduct under the conditions set out. There is a conflict in the evidence as to whether at the time that plaintiff was injured the driver of the Soper truck had returned to the truck. There

is a factual dispute as to whether or not the Soper truck had been stopped solely for the purpose of loading. There is the unexplained circumstance that when the police officers arrived very shortly after the accident the Soper truck had disappeared. It would seem that if the testimony of the driver of the Soper truck, that he had stopped for the purpose of backing his truck to the dock to load it, were true, he would have remained there for that purpose.

There also is a conflict in the testimony as to the location of the Soper truck. If it was parked with the front wheel on the sidewalk, an inference could be drawn that a person passing in the rear of that truck would have his view to the north obscured. It has been held that a violation of a statute or an ordinance prescribing a duty for the protection of persons and property is evidence of negligence if such violation caused or contributed to cause the injury. Stine v. Union Electric Co., 305 Ill. App. 37, 26 N.E.2d 433, and cases therein cited.

Cline testified that he walked north on the west side of the street; that when he was three or four feet south of the rear of the Soper truck he started to walk east; that his vision was obstructed and he could not see traffic coming from the north; that he looked to the right and the street was clear; that when he was two feet east of the parked truck and looked north he first saw the Kirchwehm truck almost on top of him; and that he heard no warning signal from that truck. In Jones v. Standerfer, 296 Ill. App. 145, 15 N.E.2d 924, the court said:

> "If at the time she was hit she was only four or five feet from the north curb line then she was in that part of the street where westbound traffic was required to travel. She testifies she made observation for traffic and that no car was approaching from the east. She had a right to assume that the traffic coming from the west going east would be on the south

> side of the street and we do not believe that the statute imposed the duty upon her to yield a right of way to traffic going in an easterly direction when she was still in that part of the street where the westbound traffic was required to travel. * * *"

In the case before us Cline was not guilty of contributory negligence as a matter of law.

In Ney v. Yellow Cab Co., 2 Ill.2d 74, 117 N.E.2d 74, the court said:

> "Questions of negligence, due care and proximate cause are ordinarily questions of fact for a jury to decide. The right of trial by jury is recognized in the Magna Charta, our Declaration of Independence and both our State and Federal Constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact-finding body. The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from the jury is to usurp its function. Bailey v. Central Vermont Railway Co., 319 U. S. 350."

In Gray v. Terminal Railroad Association of St. Louis, supra, the court said:

> "The question of contributory negligence on the part of the plaintiff is a question of fact for the jury and only becomes a question of law when the evidence is so clear as to such fact that all reasonable minds would agree that there was contributory negligence (Thomas v. Buchanan, 357 Ill 270, 277, 192 NE 215)."

Soper also argues that even if it is held that it was negligent, its negligence was not a proximate cause of the injury and that the parking of its truck was merely a condition which made the injury to the plaintiff possible. In Ney v. Yellow Cab Co., supra, the court cites and quotes from Neering v. I. C. R. R. Co., 383 Ill. 366, 50 N.E.2d 497, in which latter case the court stated: "The injury must be the natural and

probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen as likely to occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which resulted from his act." See also Johnston v. City of East Moline, 405 Ill. 460, 91 N.E.2d 401; Merlo v. Public Service Co., 381 Ill. 300, 45 N.E.2d 665; and Moudy v. N.Y. C. R.R. Co., 385 Ill. 446, 53 N.E.2d 406. In the instant case the evidence is sufficient to establish the factual conclusion that plaintiff was injured because of the combined negligence of Kirchwehm and Soper. In Sullivan v. Ohlhaver Co., 291 Ill. 359, 126 N.E. 191, the court said:

> "The mere fact that the injury would not have happened but for the negligence of Feece is not sufficient to exonerate plaintiff in error, for if defendant in error was injured by the combined negligence of both parties he can maintain an action against either. (Waschow v. Kelly Coal Co., 245 Ill. 516; Seith v. Commonwealth Electric Co., 241 id. 252; Chicago and Eastern Illinois Railroad Co. v. Hines, 183 id. 482.)"

Upon a careful examination of the record it cannot be said that all reasonable men would necessarily find that Soper was not negligent, or that plaintiff was guilty of contributory negligence, or that the negligence of Soper was not a proximate cause of the injuries. The trial court committed no error in overruling Soper's motion for judgment notwithstanding the verdict.

The plaintiff here is appealing from the trial court's denial of his post-trial motion asking for a new trial on the question of damages only. He contends here that the damages

awarded by the jury were inadequate and that they resulted from the failure of the jury to take into consideration proper elements of damage clearly proven and from improper conduct of the defendants' counsel. The defendant Kirchwehm in its brief asks that the appeal be dismissed on the ground that the plaintiff had filed an amended post-trial motion more than thirty days after the verdict and judgment.

The jury rendered its verdict and the court entered judgment on June 30, 1960. The plaintiff on July 26, 1960 filed a post-trial motion, and in that motion he asked that the court set aside the verdict and grant a new trial "as to damages only or on the issue of defendants' negligence and damages, or a new trial." On July 29, 1960 defendant Soper filed a post-trial motion asking the court to set aside the special finding of the jury, to enter judgment notwithstanding the verdict, or, in the alternative, to order a new trial. These motions were continued from time to time, and on October 6, 1961 the plaintiff filed an amended post-trial motion, in which he asked that the court set aside the verdict of the jury, vacate the judgment, and grant the plaintiff a new trial on the issue of damages only.

The court on October 6, 1961 entered an order which, after reciting that Cline "through his counsel having withdrawn the said motion and having presented to the Court on this day an amended post-trial motion of the plaintiff, Melvin Cline, moving the Court to set aside the verdict of the jury, to vacate the judgment entered thereon, and to grant the plaintiff a new trial on the issue of damages only," denied the

post-trial motions of Soper and Cline.

In this court Kirchwehm argues and cites authorities to the effect that the filing of an amended pleading operates as an abandonment of the original pleading it supersedes, and that consequently the plaintiff's appeal should be dismissed. This argument is not tenable. In Kagan v. Kitchens of Sara Lee, Inc., 20 Ill. App.2d 303, 155 N.E.2d 832, the court held that when the defendant filed a post-trial motion assigning points relied upon for relief from a first judgment and seeking a new trial, and after argument the court denied the post-trial motion, it is within the discretion of the court as to whether the defendant should be granted leave to file a supplement to its post-trial motion by specifying new grounds for relief, and it is also so held in Thomas v. Rossetter, 339 Ill. App. 647, 91 N.E.2d 155. Also see Taylor v. Hughes, 17 Ill.App.2d 138, 144-5, 149 N.E.2d 393, 397. The plaintiff's post-trial motion was properly before the court.

In order to understand the basis for the argument made by plaintiff it is necessary to set out the facts appearing in the record. At the time of the occurrence the plaintiff's health was good, and he had never injured his left arm or had difficulty with his left shoulder except for an attack of bursitis in the late forties. He had suffered a heart attack in August 1953 and was treated on that occasion by Dr. Herbert F. Binswanger. Dr. Binswanger testified that he had diagnosed the heart attack as a coronary thrombosis. He did not hospitalize the plaintiff but recommended bed rest. He again saw the plaintiff in the latter part of August and at his

office four times in September 1953. He again checked him on October 7, 1953, at which time he determined that the plaintiff had made an excellent recovery, which was corroborated by a further check on November 13, 1953. Dr. Binswanger was called to the hospital after the accident. He made an objective examination of the plaintiff which revealed lacerations on the forehead, bleeding from his nose, bruises, discoloration and swelling of the left big toe, a deformity of the left arm and shoulder, and a blackened left eye. In addition plaintiff was in shock, was nervous and upset, and was in severe pain. Dr. Binswanger called in as consultant Dr. Irving Wolin, an orthopedic specialist.

From examination and x-rays Dr. Wolin found that the plaintiff had a compound fracture of the left humerus, the external wound being at a point midway between the elbow and the shoulder, a comminuted or crushing fracture of the left clavicle (collarbone), and a fracture of the scapula (shoulder blade). He took care of the lacerations on the plaintiff's forehead and reduced the fractured scapula and clavicle. As his first treatment for the fractured humerus Dr. Wolin performed an operation which consisted of opening and cleaning the external wound. The bone ends at the fracture were aligned, fixated, and immobilized by a Roger Anderson skeletal fixation, which consisted of metallic nails inserted into holes drilled into the bone, and a series of rods and clamps running between the two sets of pins. The doctor also applied a plaster of paris cast around the entire body and arm, which immobilized the scapula and clavicle fractures, and reinforced the

demobilizing action of the humerus provided by the Roger Anderson fixation. On December 12, 1953 an x-ray showed an excellent alignment of the fractured humerus.

The plaintiff was in the hospital from December 11, 1953 to January 17, 1954. On January 9, 1954 Dr. Frank Glassman, a partner of Dr. Wolin, removed the immobilization devices applied by Dr. Wolin, and in their stead immobilized the arm with a plaster of paris cast that enveloped the shoulder and extended down to the knuckles of the hand. The pins inserted by Dr. Wolin were removed because of plaintiff's complaint that they were causing him considerable pain. An x-ray taken January 13, 1954 revealed that the humerus still maintained an excellent alignment, and it was testified that the removal of the pins before there had been a union would not cause nonunion when another type of fixation replaces the pins.

X-rays were again taken March 2, 1954 and they revealed that the fracture ends of the humerus were displaced and that no union was taking place. The orthopedic experts who testified agreed that for some reason not clear to the medical profession the humerus is one of the bones in the human body which has an affinity for nonunion. Dr. Carlo Scuderi, who examined the plaintiff at the request of the defendants, testified that nonunion in the humerus is a common complication.

The plaintiff returned to the hospital on March 28, 1954 and remained until May 9, 1954. On March 31, 1954 Dr. Wolin performed a bone grafting operation in an endeavor to get a union. In this operation a piece of bone was sawed from plaintiff's right shin bone, the bones of the humerus

were then aligned, and then the grafted bone was attached by means of surgical screws inserted both above and below the fracture area. To further support the fixation of the graft and the humerus, the shoulder was opened, a hole was bored in the upper end of the humerus and a metallic rod, approximately twelve inches long, was inserted down the center of the humerus bone. After the wounds were closed a plaster of paris cast was applied which enclosed the body and the entire arm down as far as the palm of the hand.

On April 6, 1954 an x-ray showed the bones of the humerus in such good apposition that the fracture line could not be visualized. An x-ray of the right shin taken June 15, 1954 showed that the area from which the bone graft had been taken was filling in with new bone. The plaintiff testified that this leg was sore after the operation and would swell up, and that for about two years he used a cane to aid him in walking. In June 1954 Dr. Wolin applied a plaster of paris cast to this leg and later, in 1955, applied a boot cast of elastic adhesive tape.

At the time the operation was performed on the plaintiff in March he received a transfusion of blood from the blood bank of the hospital. During June of 1954 he developed hepatitis, which could be found came from the blood used in the transfusion. Dr. Wolin testified that there might or could have been a relationship between the transfusion and the hepatitis and that that was not an uncommon complication in surgery. Plaintiff was again hospitalized from June 29th to August 13th.

On August 10th surgery was performed to remove the pin or rod which had been inserted down the center of the humerus. An x-ray taken two days later showed the bone graft and screws in place, and an apparently solid bony union across the fracture site with the exception of a marginal defect of one-eighth of an inch. The same x-ray showed a complete healing of the fractures in the clavicle and scapula.

X-rays were taken in September 1954, and from them it appeared that the fracture line in the arm had disappeared, indicating a union, and physiotherapy was recommended. In the latter part of September plaintiff returned to the hospital as an out-patient for physiotherapy and occupational therapy on his left arm, and for x-ray treatment on the right leg from which the bone graft had been removed. On one occasion, when a physiotherapist was moving the arm, plaintiff experienced a sudden pain which occurred in a bicep muscle. Dr. Wolin examined the fracture site and found that the arm bone was solid and free of pain. Dr. Wolin again put a short cast on the arm to rest it. On November 23, 1954 an x-ray was taken which showed a fracture extending through the bone graft, and it was the uncontradicted opinion of Dr. Wolin that the gap, or fracture, had resulted from the dissolution of bone substance and calcium in both the graft and the ends of the original fracture. He stated that the picture shown in the x-ray had all the appearance of a gap that results from internal conditions rather than external force.

An x-ray was taken in January 1955 which revealed a classical nonunion in the humerus bone. On February 21, 1955 Dr. Glassman performed further surgery, which consisted

of removing what was left of the graft, opening the ends of the original fractures, scraping the bone so as to cause overlapping along the fracture line, and then again aligning them and applying both internal and external fixation, the former by the use of four screws, and the latter by a body cast. An x-ray taken February 22nd showed the screws in place and the bone ends of the fracture in an overlapping position. An x-ray taken May 26, 1955 showed that callus was forming around the fracture site, but that there was a gap of one-eighth of an inch between the bone ends and evidence that the bone ends were softening or decalcifying.

On November 15, 1955 plaintiff was again hospitalized, and on this occasion Dr. Wolin performed another bone graft, taking the bone from plaintiff's right shin. Dr. Wolin testified that before this operation he had consulted with other physicians, Dr. Harold Sofield of the Shriners' Hospital and immediate past president of the American Academy of Orthopedic Surgery, and Dr. Berkheiser of the Presbyterian Hospital. In the operation two pieces of bone, five inches long, a quarter of an inch thick and a half inch wide, were placed on either side of the fracture site, and were held in place by loops of stainless steel wire. The bones of the humerus had again been aligned and secured together by two transversely placed screws. X-rays taken in November 1955 and January 1956 showed all components of the graft in place and holding, as did a picture taken March 2, 1956. In the latter x-ray, however, a gap of one-eighth inch appeared across the fracture site, showing a failure of bony union.

Lack of union was also shown by x-rays taken later in March and during April. An x-ray taken May 28, 1956 showed not only the nonunion of the humerus but also the loss of calcium and bone dissolution from the bone ends of the fracture. Dr. Wolin then recommended that the plaintiff see Dr. Arthur Steindler, Chief of the Department of Orthopedic Surgery at the University of Iowa, whom he described as the outstanding orthopedic personality in America.

On June 21, 1956 plaintiff went by train to Iowa City to see Dr. Steindler, and while boarding the train his left foot slipped off the step. As a result he skinned his left shin bone, and his left arm, which was in a cast, bumped against the hand railing.

In October 1956, January 1957 and June 1960 x-rays revealed a wide nonunion and extreme gap between the bone fragments of the humerus, and on the last occasion the appearance of a false joint, or permanent nonunion, in the middle of the humerus. Dr. Wolin testified that the conditions shown in the last picture were permanent in his opinion, and explained that with the humerus in such condition the normal functions of the left hand and arm cannot be performed and that such disuse would cause an atrophy of the muscles in the arm.

In February 1959, the plaintiff was examined at the request of the defendants by Dr. Carlo Scuderi, a capable and experienced orthopedic surgeon. He had x-rays made and found a fractured left humerus, the fracture gap being about three-quarters to one inch wide, and he testified that with such a condition in the humerus bone one cannot lift or push anything,

nor can one use the hand. He found the scars of the various operations, a definite deformity of the left collar bone, and an atrophy or shrinking of the muscles in the left arm. He also found that the left arm was shorter than the right, and that it was necessary to immoblize the arm and to stabilize it against the chest by use of a cast and sling to give the plaintiff some comfort.

The trial commenced on June 17, 1961. Dr. Wolin testified that June 13th, a few days before the trial, at the request of counsel for plaintiff he examined the plaintiff, found substantially the same conditions as Dr. Scuderi, and stated that in his opinion the condition was permanent and that nothing more could be done medically or surgically to correct the condition. He stated that the arm in its condition would be a constant source of pain, and that a support such as plaintiff wears would reduce but not eliminate the pain.

Dr. Scuderi also testified that a nonunion of the humerus is quite common, and he further testified that with fractures of a humerus the more times an operation is performed at the same site the chances of success for the operation are lessened. He further stated that from his examination of the plaintiff and a study of the x-rays an operation by a competent and qualified orthopedic surgeon is a calculated risk, but that he would recommend such an operation.

The plaintiff testified that at the time of the trial he had no use of his left arm, and that he requires assistance in such things as eating, dressing and bathing; that he wears a special type of removable cast which covers the upper portion

of the arm, and the arm is held in a fixed position across his body; that his right leg, from which bone grafts were removed, still causes him difficulty and limits his activity; and that the condition of the left arm is such that he is caused pain.

Dr. Wolin and his associates charged for medical services, including six operations, fifty sets of x-rays and 106 visits, other than when hospitalized, $6,000. Dr. Binswanger's bill was $425, and plaintiff's hospital bills were $4,477.77.

The plaintiff also testified that in four months of 1953, prior to the accident, he had earned as a manufacturer's agent, $3,595.43, which is roughly $898 a month. The plaintiff's life expectancy at the time of the trial was, according to United States Life Tables, 15.9 years.

It is the law that where one is injured by the wrongful act or negligence of another and exercises ordinary care in employing a medical practitioner and the practitioner by reason of malpractice aggravates the original injury, the original tort-feasor is liable for the aggravation. The law does not make the plaintiff in an action for personal injuries an insurer that the surgeon or doctor he employs will be guilty of no negligence, error of judgment or want of care. 15 I.L.P. Damages, sec. 38. In Chicago City Ry. Co. v. Saxby, 213 Ill. 274, 72 N.E. 755, the court lays down the rule that all the law requires of an injured person is that he exercise such prudence as men and women of ordinary judgment under like circumstances would exercise in the choice of physicians and the means to be used to effect recovery, and states that he is not an insurer bound to act at his peril. The court stated:

> "In Pullman Palace Car Co. v. Bluhm, 109 Ill.20, which was a personal injury case, the court permitted the plaintiff to prove that the bones of his arm which were broken had not healed but that the same had formed a false joint. On page 25 the court said: 'If appellee exercised ordinary care to keep the parts together and used ordinary care in the selection of surgeons and doctors, and nurses, if needed, and employed those of ordinary skill and care in their profession, and still, by some unskillful or negligent act of such nurses or doctors or surgeons, the parts became separated and the false joint was the result, appellant, if responsible for the breaking of the arm, ought to answer for the injury in the false joint. * * * The liability to mistakes in curing is incident to a broken arm, and where such mistakes occur, (the injured party using ordinary care,) the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm.'"

See also Guth v. Vaughan, 231 Ill. App. 143; Chicago City Ry. Co. v. Cooney, 196 Ill. 466, 63 N.E. 1029; Horney v. St. Louis & Northwestern Ry. Co., 165 Ill.App. 547.

In the instant case the surgeons and physicians who were selected to treat the plaintiff had extensive education, experience and professional recognition in orthopedics and orthopedic surgery. The defendants did not introduce evidence to challenge the competency of these men, nor did the evidence in the record show that the procedures followed by them were not in accordance with proper medical procedure.

In the cross-examination of the physicians attending the plaintiff counsel for both defendants attacked the experience of the attending doctors with reference to their treatment of the fractured humerus. They questioned whether the doctors had experience in the use of intramedullary pins and suggested that the use of these pins was improper. They attempted to show that the doctor had failed to remove the

scar tissue, and they suggested that the scar tissue should have been subjected to a pathological study, that the cast had been removed too soon, and that the doctor was remiss in not protecting the blood transfusion procedures through which the plaintiff acquired hepatitis. An attempt was made to show that the several operations were unnecessary because of improper operative procedure. Again it was suggested that the nonunion was caused by the premature removal of the fixation process. All of these questions were objected to and the objections were sustained by the court.

During the cross-examination both counsel for Kirchwehm and counsel for Soper persisted in attacking the competency of the attending doctors and in many instances disregarded the court's ruling on objections. In one instance counsel for Kirchwehm, after the court had ruled that he might call the doctor's attention to the hospital records without asking him to state the contents thereof, asked the doctor as to whether, having looked at his records, his memory was refreshed as to whether or not a fracture line was evident in that x-ray. The court said: "No, you are doing just the thing I told you not to do. Strike it out, and the jury will disregard it." In cross-examination of a doctor by counsel for Soper the doctor was asked the following question: "Doctor, if there were sufficient force to cause such a piece of bone to detach itself by a fracture, that could be instrumental in causing a nonunion could it not?" Objection was made and sustained by the court. Counsel again asked in substance the same question, which was again objected to, and the objection was sustained. Counsel

then asked the following question: "I believe counsel asked you about subsequent injury to a person who has had a fracture of the humerus. Doctor, a fall onto the left arm such as you saw on your X-rays, that could be such a subsequent injury as to materially affect the healing of that fracture?" The question was objected to and the court said: "Counsel, you are back on the same road you were on before." Counsel replied: "That's right, your Honor." The court: "Sustained."

The questions were asked with reference to a fall or bumping of plaintiff's left arm while he was enroute by train to Iowa City to see Dr. Steindler. Prior to that time the x-rays showed a nonunion of the humerus, loss of calcium and dissolution at the bone ends of the fracture. There is nothing in the record which indicates that the fall or bumping could have anything to do with the separation of the humerus.

It has been held that where there was an injury which was aggravated by a subsequent accident the subsequent accident might be considered as flowing from the original injury. 15 Am. Jur. Damages, sec. 87. Also see annotation, 9 A.L.R. 255. However, in this case the questions were improper without considering the rule above mentioned since there was definite evidence in the record that before the plaintiff had left for Iowa City there was a nonunion of the humerus, loss of calcium and dissolution at the bone ends of the fracture.

Counsel for Soper also examined Dr. Binswanger in considerable detail about a heart injury. He also questioned Dr. Binswanger as to whether the plaintiff had a hernia in 1951. This question was objected to and the objection was sustained.

Promptly thereafter counsel asked: "And was there any prescription or any appliances prescribed for him in 1951?" This question was also objected to and the objection was sustained.

Questions were asked in the long cross-examination in which previous treatment of the plaintiff by the physicians was brought out in matters which had no materiality insofar as the present suit was concerned. In one instance, while examining one of the doctors with reference to his previous treatment of the plaintiff for a heart condition, and the doctor had testified that at the time the plaintiff was suffering from a coronary thrombosis, the attorney for Soper read from a deposition previously taken of the doctor in which he had said that he had not treated the plaintiff before the date of the accident for anything serious. Counsel for the plaintiff objected and the court sustained the objection on the ground that it was immaterial. He then asked the doctor about whether or not he had treated him for a heart attack prior to the accident. The court said it was repetitious, but the doctor answered the question. There was some further discussion about whether or not the doctor had indicated on his records that he had treated him for the heart condition on the 18th day of the month when he actually had seen him on the 19th. The court sustained the objection.

The attorney for Soper attempted to cross-examine the plaintiff with reference to his eyesight and as to one time he was in the hospital with reference to his eyes. The court sustained the objection, holding that in view of the fact that the plaintiff was not claiming damages for loss of vision

due to a cataract during his hospitalization, it could not be inquired into by the defendant. See Caley v. Manicke, 29 Ill.App.2d 323, 173 N.E.2d 209.

Dr. Scuderi was the physician whom the defendants had engaged to examine the plaintiff. He was called by the plaintiff as his witness. The attorney for Soper, in cross-examination of the doctor, had brought out that it was the doctor's opinion that with fractures of the humerus the more times an operation is performed at the location of the fracture the chance for success of the operation is lessened, and the doctor then stated: "From my examination of this man and the examination of the x-rays, an operation by a competent qualified orthopedic surgeon is a calculated risk in this case. I would recommend another operation if that is what you mean." The attorney then asked the following question: "That is you mean by that by a man who is skilled in the field of orthopedic surgery?" Answer: "Yes." Counsel for plaintiff objected to the question and the court struck it. The import of the insinuation implied in the question undoubtedly was not lost upon the jury.

It would prolong this opinion too much to point out any further matters improperly brought before the jury by counsel questioning witnesses on matters which they either knew or should have known were incompetent and improper and to which objections were sustained by the court.

It is the law that where a person is injured in an accident and he has a previous disease which is aggravated or stirred into action on account of the accident, the tort-

feasor is responsible for such aggravation. 15 I.L.P. Damages, sec. 37. The questions asked in this examination concerning his previous disease were not asked for that purpose, nor was there any attempt on the part of the plaintiff to recover on this theory. Hence the questions were totally immaterial. The case was being tried for the defendants by two experienced and competent lawyers. They either knew or should have known what the law was. Objections were repeatedly sustained by the court, and defendants' counsel disregarded the rulings. It is a well known fact that the continual presentation before the jury of questions of this character can be extremely harmful to the plaintiff's case. The plaintiff in his brief in this court has set up all of the allegedly improper cross-examination on the part of the defendants. In Miller v. Chicago Transit Authority, 3 Ill.App.2d 223, 121 N.E.2d 348, this court in reversing for inadequacy a personal injury judgment recovered by the plaintiff discussed the prejudicial conduct on the part of counsel for the defendant, and the court quotes from Gordon v. Checker Taxi Co., 334 Ill. App. 313, 79 N.E.2d 632, stating:

> "'Innuendoes involved in such questions are sometimes more damaging than an effort to prove the impeaching facts. * * *
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> "'We cannot place our stamp of approval upon such trial practice. It does not result in a fair trial according to settled standards, and a verdict so obtained should not be permitted to stand. Wellner v. New York Life Ins. Co., 331 Ill. App. 360, 365.'"

The court further holds that the prejudicial effect of the questions is not removed by the court's rulings sustaining

objections thereto, citing Bishop v. Chicago Junction Ry. Co., 289 Ill. 63, 69, 124 N.E. 312, 314, and Bale v. Chicago Junction Ry. Co., 259 Ill. 476, 102 N.E. 808. The defendant Soper in its brief in meeting the assertions and contentions of the plaintiff only makes the assertion that the charge that the defendants' counsel were guilty of misconduct on the trial was utterly unfounded, and then it puts in two instances where it alleges that counsel for plaintiff had acted improperly, and states that the plaintiff had been utterly discredited as a witness. It bases the latter contention on the fact that the plaintiff testified that in April 1957, three years after the suit was filed, he had filed a claim in the District Court in bankruptcy against the Consolidated Tool and Manufacturing Company for $1,546.71, and he testified that he earned the money in 1953 prior to December 11th. In the claim, which was verified by the plaintiff, it was stated that he had earned the money within three months prior to December 30, 1956. The claim does not appear in the record, nor apparently was it introduced in evidence. The plaintiff says with regard to it that he did not know what it said but the lawyer had filed it, and that he (plaintiff) did not fill it out. He was then asked if he had filed an income tax return for 1953. At that time he stated that he thought he had thrown his copy of the tax return away. Plaintiff subsequently brought in what he claimed was a true copy of his income tax return, and at that time he testified under cross-examination by Soper's counsel that the money set out in the claim filed in the District Court against the Consolidated Tool and Manufacturing Company was earned in 1953 prior to

December 11th. The income tax return was not introduced in evidence.

Soper also claims that the plaintiff was impeached in his testimony that he was unable to drive a car at any time after the accident because he testified that he "drove by in the car one day to look at the place where I was hit." He did not testify that he himself was driving the car, nor was he asked. He did file two applications for driver's license, one in 1954 and one in 1957, in each of which he stated that he had no physical defects which would interfere with safe driving, and in one filed in 1960 he made the same statement and stated that he had driven a motor vehicle 2,000 miles during the last twelve months. It is a matter of common knowledge that applications for driver's license, particularly when made by one seeking to retain his license in existence, are not models of accuracy. The impeachment contained in these statements are not of the character which should cause the jury to disbelieve all of the testimony of the plaintiff. The evidence is clear and uncontradicted that the plaintiff had suffered severe injuries and that the injuries were permanent. In any case, these statements would not constitute effective impeachment of the plaintiff's claim for damages.

Soper also argues that because Dr. Binswanger and the plaintiff disagreed as to whether he had a nurse in 1953 prior to the accident either of them had lied. We have difficulty in seeing the materialty of the question in the first place. Soper in its brief also calls attention to

some confusion on the part of Dr. Binswanger with reference to the hospital records, and it puts considerable weight on the fact that there was some conflict in the evidence between the testimony of plaintiff and Dr. Binswanger's office records as to whether or not the plaintiff fell on his left arm in June 1956. Again we cannot see where this matter is material at all. There is uncontradicted testimony in the record that at the time that the fall occurred, if he did fall, there was a definite lack of union of the humerus. During oral argument before this court some questions were asked by a member of the court with reference to the fall and the nonunion of the humerus. One of the counsel for defendants then stated that during the trial he and the other counsel for defendants agreed that since counsel for plaintiff was examining his witnesses in meticulous detail as to the injuries that they would "exhaust the jury's patience with detailed explanations of these operations and surgical techniques to the point that the prejudice that often times is generated by a description of the sawing of bone and the piercing of more bone and muscle and tissue would become a matter of no consequence in this trial * * *."

As we have said, the integrity of plaintiff's medical witnesses and the propriety of their treatment had no place in the trial. When the defendants brought before the jury, by means of improper questions, matters which were immaterial and prejudicial, and persisted in such conduct so as to create a definite pattern in the case, they were depriving the plaintiff of a fair trial on the question of damages. In Eizerman

v. Behn, 9 Ill.App.2d 263, 132 N.E.2d 788, we said: "A trial properly conducted is a dignified procedure. Counsel in the case are officers of the court and owe a duty to the court, to opposing counsel, to the cause of justice and to themselves." In Paul Harris Furniture Co. v. Morse, 10 Ill.2d 28, 139 N.E.2d 275, the trial court had, in ruling on post-trial motions, denied the plaintiffs' alternative motions for a new trial solely on the issue of damages. The Appellate Court affirmed that ruling of the trial court. Leave to appeal was allowed, and the court said (pp. 45-46):

> "The question of whether a new trial granted on the ground of inadequacy of damages may be limited to the issue of damages only has never before been squarely presented to this court. We find, however, that in other jurisdictions where this question has been raised it is generally recognized that in actions for damages due to negligence a court does have the power in a proper case to set aside an inadequate verdict and to limit a new trial to the issues of damages alone. * * * [Citations.] We also find that here in Illinois, in accordance with the weight of authority throughout the United States, our appellate courts have recognized that when remanding a cause for a new trial on the ground of inadequacy or excessiveness of damages, an appellate court may limit such new trial to the issue of damages only. Olson v. Chicago Transit Authority, 346 Ill. App. 47, aff'd 1 Ill.2d 83, on other grounds; Springer v. Yellow Cab Co., 328 Ill. App. 354; Tennes v. Tennes, 320 Ill. App. 19.
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> "While not controlling here, we find the reasoning of the above authorities to be persuasive, and therefore hold that either a trial or an appellate court may set aside an inadequate verdict and order a new trial solely on the issue of damages in a proper case, that is, in a case where the damage issue is so separable and distinct from the issue of liability that a trial of it alone may be had without injustice. (Gasoline Products Co. v. Champlain Refining Co., 283 U. S. 494, 75 L. ed. 1188.) We believe that in the instant case, since the verdict against Walker on the question of liability was amply supported by the evidence, the question of the amount of damages is separable and distinct from the issue of liability, and that the error which resulted in inadequate

damages did not affect the issue of liability."

The court then stated that a court is not justified in ordering a new trial on the issue of damages alone where it appears that the damages awarded by the jury were a compromise on the question of liability, and further said: "In this case, however, there is nothing to indicate such a compromise, and, in fact, the record points rather to misunderstanding or confusion of the jury by the evidence of the Acme settlements."

James, in "Damages in Accident Cases," 41 Cornell Law Quarterly, p. 582, said:

> "What then is compensation? The primary notion is that of repairing plaintiff's injury or of making him whole as nearly as that may be done by an award of money. The 'remedy [should] be commensurate to the injury sustained.' [Rockwood v. Allen, 7 Mass. 254, 256.] '[W]hoever does an injury to another is liable in damages to the extent of that injury.' [Dexter v. Spear, 7 Fed. Cas. 624, No. 3867 (C.C.D.R.I. 1825)] Sometimes this can be accomplished with a fair degree of accuracy. But obviously it cannot be done in anything but a figurative and essentially speculative way for many of the consequences of personal injury. Yet it is the aim of the law to attain at least a 'rough correspondence between the amount awarded as damages and the extent of the suffering,' [Restatement, Torts sec. 903, comment a] or other intangible loss. * * *"

As long ago as 1931 Mr. Justice Scanlan, in Princell v. Pickwick Greyhound Lines, 262 Ill. App. 298, held that in a case where the evidence showed that the plaintiff had sustained a broken back, that he had been operated on and bone grafted to his spine which resulted in a stiffening of the vertebrae, that since the operation he was obliged to wear a brace, and that he would suffer pain as long as he lived, a verdict for $75,000 was not excessive. In the case before us the uncontradicted evidence shows the various operations performed on the plaintiff,

the fact that he has a nonunion of the humerus of the left arm with a space of about three-quarters of an inch between the bones, resulting in a false joint and in a shortening of the arm by three inches, and that his right leg from which the bone grafts were removed still causes him difficulty and limits his activity. He is required to wear a special type of removable cast which covers the upper portion of the arm, and the arm is held in a fixed place against his chest. The condition of the left arm is such that all doctors agree that it would cause pain. The verdict for $30,000 is inadequate. It can safely be said it was not the result of a compromise but it was the result of a deliberate attempt on the part of counsel for the defendants to improperly bring matters before the jury which would cause them to return a verdict in an amount less than adequate compensation for the injuries suffered by the plaintiff as a result of the accident. As far as the liability is concerned the jury had the matter pinpointed before them. They returned a general verdict in favor of the plaintiff and against the defendants, and found by their answer to an interrogatory that the plaintiff was not guilty of contributory negligence, hence clearly finding that in their opinion defendants were guilty of negligence and that the plaintiff at the time and place in question was not guilty of contributory negligence.

The trial court did not err in denying Soper's motion for judgment notwithstanding the verdict. The trial court erred in not sustaining plaintiff's motion for a new trial on the issue of damages. The judgment of the trial court is

affirmed insofar as it entered judgment upon the jury's verdict finding defendants guilty, but is reversed insofar as it entered judgment for $30,000 upon the jury's assessment of damages. The order of the trial court of October 6, 1961, insofar as it denied plaintiff's motion for a new trial, is also reversed, and the cause is remanded with directions to the trial court to grant plaintiff's motion for a new trial solely on the issue of damages. The order of October 6, 1961, insofar as it denied Soper's motion for judgment notwithstanding the verdict and for a new trial, is affirmed.

Affirmed in part; reversed in part and remanded with directions.

Dempsey, P.J., and Schwartz, J., concur.

Abstract only

42 Ill App 256

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10457 Agenda No. 6.

Joseph B. Casserly, Jr.,

Plaintiff-Appellee,

vs.

Pearl D. Pointer and Eloise Pointer,

Defendants-Appellants.

Appeal from the Circuit Court of Champaign County.

REYNOLDS, J.

Plaintiff and defendants entered into a written contract for the building of a truck inspection building, plaintiff to furnish materials and labor for the sum of $14,200.00. The building was to be built in accordance with plans and specifications of an architect and upon completion the architect was to furnish a certificate of completion according to contract.

Differences arose between the parties, and after demands on the part of the defendants that the plaintiff complete construction, the defendants entered into possession and notified the plaintiff they would complete the building themselves. There was conflicting testimony as to the unfinished work. Plaintiff brought suit for the contract price and the jury found there was due plaintiff the sum of $13,291.70. Judgment was entered for plaintiff and defendants appeal.

As grounds for appeal, defendants claim the plaintiff failed to aver and prove the certificate of completion by the architect, and that the suit was premature because the building was not completed.

There is little dispute as to facts:-the factual issue being the amount of work necessary to complete the building to plans and specifications, and this was determined by the jury. This leaves the legal question raised by the defendants, namely, that the architect's certificate was a condition precedent, and that the plaintiff having failed to aver and prove the certificate, the complaint was insufficient and the plain-

tiff can not recover on the contract.

There was no averment or proof by the plaintiff that the architect had given a certificate of performance or completion of the work. Plaintiff contends that the certificate was waived by defendants, and that the averment of completion in Paragraph 4 of the complaint was sufficient.

In order to pass on these questions, it is necessary to examine the pleadings. The complaint, after reciting the written agreement between the parties, in Paragraph 4 of the complaint says:

> "That thereafter pursuant to said written agreement the plaintiff did construct said truck inspection building on the said property of the defendants in accordance with said contract and completed the same about the first day of August A.D. 1960, and the defendants have at all times since and are now in possession of, use of, and benefiting from the said building so constructed by the plaintiff."

The defendants' answer admitted being in possession of the premises and building but denied plaintiff constructed the truck

inspection building on said property pursuant to the agreement or in accordance with the contract and denied they had received any benefits from the building. The plaintiff thereafter filed an amended complaint, but did not amend Paragraph 4. The defendants answered the amended complaint and again denied that plaintiff constructed the building in accordance with the contract, denied he completed the work on August 1, 1960, and further answering set up some twelve items of ommission or failure on the part of the plaintiff.

The case was tried before a jury and the jury found the amount due to plaintiff was $13,291.70. The jury answered a special interrogatory propounded to them, namely: "Did Joseph B. Casserly, Jr., make substantial performance of the terms of his contract with Pearl D. Pointer and Eloise Pointer", answering "Yes The defendants, in their post-trial motion, moved for arrest of judgment and for a new trial. Here, for the first time, defendant raise the question of averment or proof of the architect's certificate.

The defendants contend that the averment in Paragraph 4 of the complaint was insufficient; that the plaintiff's furnishing

of the architect's certificate was a condition precedent, and there being no averment of the furnishing of the certificate and no evidence to show why it was not furnished, the plaintiff must fail; that recovery could be had only on the contract, and failure to satisfy the condition precedent was fatal. In support of this position, defendants cite a number of cases holding that in suit on a contract, recovery could be had only upon a declaration setting up the contract, averring performance as to furnishing the material and performing the work, and stating the reason for the builder's failure to satisfy the condition precedent and comply with the contract by furnishing the architect's certificate. All of these cases were decided before the adoption of the Civil Practice Act of 1933. The Civil Practice Act of 1933, in Supreme Court Rule 13, adopted the rule that governs today, in this language:

"(3) In pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party performed all the conditions on his part; if the allegation be denied, the facts must be alleged in connection with the denial showing wherein there

was a failure to perform." Chap. 110, Section 101.13 (3), Ill. Rev. Statutes.

Under the cases cited by defendants, there was a duty on the part of the plaintiff to state the reason for the failure to satisfy the condition precedent. Supreme Court Rule 13 changed this and provided that the plaintiff could allege generally, performance on his part of the conditions of the contract, and if the allegation be denied, the facts must be alleged in connection with the denial showing wherein there was a failure to perform.

In the case of Norman v. School Dist. No. 1, Pope County, Ill., 8 Ill. App. 2d 466, at page 471, the court says that under common law it was necessary in recovery upon a contract to plead the conditions precedent and that those conditions had been fulfilled, or that there was a legal excuse for the nonfulfillment. But, the court further held, under Supreme Court Rule 13, it is sufficient to allege generally that the party performed all the conditions on his part, and if the allegation be denied, the facts must be alleged in connection with such denial showing wherein there was a failure to perform. In that case,

there was a certificate of completion approved by an architect, but from a reading of that case it does not appear that the architect's certificate was a matter in issue.

In suit on an oil lease where complaint alleged performance on part of plaintiff and defendant made only a general denial of plaintiff's performance and failed to allege facts showing plaintiff's failure to perform, the denial was held to be an admission of the performance of conditions precedent in the lease. McQuan v. Clark, 319 Ill. App. 520. In suits on insurance policies where the policy holder alleged he had performed all conditions of policy, the insurance company's general denial, without specifically showing facts wherein plaintiff had failed to perform condition precedent of giving notice of death of insured, admitted general allegation of performance of condition. Enloe v. American Family Protection, 291 Ill. App. 623; Weiss v. Standard Ins. Co. of N. Y., 15 Ill. App. 2d 457.

In this case, the defendants in their answer alleged some twelve specific failures on the part of the plaintiff, but did

not allege the failure to furnish the architect's certificate until the issue was raised in the post-trial motion.

That the defendants can raise the point that the complaint failed to state a cause of action in a motion in arrest of judgment, is conceded by the plaintiff, but that point is not important. Paragraph 4 of the complaint alleges in general language that pursuant to the contract, the plaintiff did construct the building in accordance with said contract. That language is sufficient under Supreme Court Rule 13. The defendants denied Paragraph 4 of the complaint generally and specifically as to some twelve alleged failures on the part of plaintiff, but did not deny as to the furnishing of the architect's certificate. Did this constitute an admission or waiver as to the architect's certificate? Giving the wording of Supreme Court Rule 13 its reasonable interpretation, the defendants had a duty to allege facts showing the failure of plaintiff to furnish the architect's certificate. This they failed to do. By such failure, they admitted the general allegation of performance on the par of the plaintiff, except as to those specifically denied. McCuan

v. Claro, 319 Ill. App. 520; Enloe v. American Family Protection, 291 Ill. App. 623; Weiss v. Standard Ins. Co. of N.Y., 15 Ill. App. 2d 457. Having waived or admitted the furnishing of the architect's certificate, they can not on appeal or in the post trial motion raise the question.

The Civil Practice Act of 1933 was intended to eliminate the technical and legalistic rules of practice that had obtained for so long in Illinois. The Practice Act and the Supreme Court Rules were adopted to dispose of litigation expeditiously and in an orderly manner. The purpose was to simplify the procedure and the prime object of the Act was to enable the parties to a cause to have the merits of their controversy passed upon by the courts - the realities considered rather than that the matter be decided upon mere technicalities which often justly bring the courts into disrepute.

In this case, if the defendants considered the failure of the plaintiff to furnish the architect's certificate an important and necessary part of their defense, they had the duty to plead su failure and have the jury and the court pass on that question as well as all the other questions in the cause.

The judgment will be affirmed.

Affirmed.

CARROLL, P.J. and ROETH, J., concur.

Abstract

42 I A 267

No. 11506 Publish Abstract Only Agenda No. 6

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

APRIL TERM, A. D. 1961

FILED
AUG 7 1963
PAUL V. WUNDER
Clerk Appellate Court Second District

AIDA A. HEABLER,

Plaintiff-Appellant,

vs.

JEWEL TEA COMPANY, INCORPORATED, ROGER N. HEABLER and LOUISE HEABLER,

Defendants-Appellees.

Appeal from the Circuit Court of Winnebago County

Smith, J.:

The plaintiff and her adult son, the defendant Roger Heabler, purchased a home for themselves and a minor son of the family in 1956. The mother furnished the down payment of $2,000.00 and made the monthly payments of $54.91 on the mortgage of $9,750.00. Roger paid room and board of $15.00 to $20.00 per week. The title to the property was taken in joint tenancy by the mother and Roger. All contract papers and the mortgage were signed by both of them at the request of the mortgagee because of the mother's age. Roger married in November of 1958 and continued to reside in the property with his wife until March 30, 1959.

Roger was employed by the Jewel Tea Company and became indebted to them. The company reduced this indebtedness to judgment on February 3, 1959. On March 30, the same year, Roger and his wife conveyed his interest in the property to his mother and moved away. On May 20, an execution was issued on the judgment

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PAULEY WUNDER
Clerk, Superior Court, San Diego County, Calif.

against Roger. Levy on Roger's interest and sale followed in due course and on June 10, 1959, Jewel Tea Company bid $2,916.45 at the sale by the sheriff, and received its certificate of purchase. Plaintiff then filed her suit seeking to remove the judgment and the certificate of purchase as a cloud on her title. The trial court dismissed her suit for want of equity and it is this decree that we review.

Our jurisdiction is challenged by a motion to transfer this cause to the Supreme Court on the theory that a freehold is necessarily and directly involved. This motion we took with the case and now deny. A suit to remove a judgment or a lien on real estate does not involve a freehold, Irwin v. Manley, 276 Ill. 353, 114 N.E. 566, nor does a proceeding to set aside a sheriff's certificate of purchase as a cloud on the title, involve a freehold. Johnson v. McDonald, 196 Ill. 394, 63 N.E. 730; Hackett v. Logan, 257 Ill. 326, 100 N.E. 978.

Plaintiff's principal contention is that the levy, sale and certificate of purchase are void for failure of the sheriff to tender the plaintiff $2,500.00 for her homestead exemption and proceeded to sale without compliance with Chapt. 52, Pars. 1 - 12, Ill. Rev. Stat., 1959, relating thereto. There is no doubt that the judgment against Roger became a lien on his interest in this property on February 3, 1959, and that his deed to his mother was necessarily subject to this lien and the lien of the mortgagee previously given by him and his mother. Indeed, plaintiff does not suggest otherwise. Roger has not and does not claim any homestead rights in the property. It is equally clear from the levy and certificate of purchase that only Roger's interest in the property was sought or reached by the sale. Whatever may have been Roger's purpose in conveying his interest in the property to his mother, it was wholly abortive as an effort to destroy the effectiveness of the judgment lien and the rights of the judgment creditor reposing therein. Neither did

it enlarge nor in any way diminish the rights that his mother then had in the property. The levy and sale by the judgment creditor did neither either. Whatever her homestead rights may be, they may appropriately be asserted by her if and when Jewel attempts through partition or otherwise to reduce its interest in the property to cash.

In her reply brief plaintiff suggests, for the first time, that because of her age and her payments, Roger was holding only the naked legal title as a trustee for her or occupied the position of a mere guarantor on the note and mortgage. This position was not asserted in the amended complaint, in the abstract or in plaintiff's original brief. It is not, therefore, before us for determination. The mere allegation that the plaintiff is now in possession of the property as her homestead and claims to own the property in fee simple are insufficient to overcome the legal presumption that a gift to her son was intended at the time the property was placed in joint tenancy. Moore v. Moore, 9 Ill. (2d) 556; 138 N. E. 2d 562.

Perceiving no error in this record, the judgment of the trial court should be and it is hereby affirmed.

Affirmed.

McNEAL, P. J. and DOVE, J. concur.

General No. 11753 Abstract Agenda No. 8

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT-FIRST DIVISION

MAY TERM, A.D. 1963

42 IA 327

Glenn Donath, Plaintiff-Appellee,	)	
v	)	Appeal from the Circuit
Anna L. Donath, Defendant-Appellant.	)	Court of Peoria County.

DOVE, J.

On June 13, 1962, Glenn Donath filed his unverified complaint for divorce in the Circuit Court of Peoria County, setting forth the marriage of the parties at Rockford, Illinois, on November 26, 1927, and alleging that the children born of the marriage are adults and that they had established separate domiciles. The complaint further alleged that the parties had lived together as husband and wife until October , 1960, at which time, the complaint charged, plaintiff's wife deserted him without reasonable cause and that since October, 1960, she has refused to live with him. The complaint prayed for a divorce on the grounds of desertion and for such other relief as the court deemed proper.

At the same time the complaint was filed, the plaintiff filed the following affidavit for publication, viz:

> "The undersigned, Glenn Donath, hereby makes affidavit and states that he is the plaintiff in the action of Glenn Donath v Anna L. Donath, and that said Anna L. Donath, defendant in this action, has departed from the State of Illinois, and to the best of his knowledge and belief, is still living outside the State of Illinois, at a place to him unknown; her last known address was 602 New York Avenue, Aurora, Illinois."

The customary notice was published in the Peoria Daily Record once each week for three successive weeks notifying defendant that the cause was pending and that a default could be entered against her on or after July 18, 1962. On that day an order defaulting the defendant was entered, the cause was heard, and a decree rendered dissolving the marriage between the parties, barring each of them from any interest in or to the real or personal property of the other, and from any right of support and alimony.

On September 24, 1962, more than two months after the decree was rendered, the cause was re-docketed, on motion of the defendant, and she filed her petition praying for an order setting aside the decree rendered on July 18, 1962, on the ground that the allegations of the affidavit upon which the publication notice was based, were untrue. The respondent appeared and made an oral motion to strike the petition "because of laches". This motion was heard and the chancellor reserved his ruling thereon. No other responsive pleading was filed to this petition, but a hearing was had, at the conclusion of which the chancellor entered an order denying the prayer of the petition. To reverse this order, Anna L. Donath, appeals.

Appellant testified that for twenty years prior to September 30, 1960, she and her husband lived together and made their home at No. 1433, 20th Avenue in Rockford; that on September 30, 1960, appellee told her to "get out and get a job"; and that she did so and took with her some of her personal belongings; that from September 30, 1960, until the first of October, 1961, she made her home with her sister-in-law at 707 1/2 North Court Street in Rockford; that during this time her husband continued to live at the 20th Avenue address; that from the home of her sister-in-law she went to the home of her sister at No. 2838 Bildahl Street, Rockford,

The customary notice was published in the Peoria Daily Record once each week for three successive weeks, notifying defendant that the cause was pending and that a default could be entered against her on or after July 14, 1941. On that day an order

where she remained from October 1, 1961, until January 23, 1962, at which time she went to live with Louise Ferguson, the wife of her brother, at No. 2329, 17th Avenue, Rockford, and has lived there since that time and was making her home there at the time of the hearing of this petition.

Appellant further testified that she had never been out of Rockford from the date she left her home on September 30, 1960, until the date of this hearing, except to go to the home of her son at Beloit, Wisconsin, fourteen miles north of Rockford, for several week-end visits, and upon one other occasion, about one week before Labor Day, 1962, she and her son visited her daughter, Mrs. Jeanette Brown at Ripley, Tennessee, and upon this visit she was away from Rockford for only one week.

Appellant further testified that during the year which immediately followed their separation, and while she lived at 707 1/2 North Court Street, Rockford, she received 3 or 4 letters from appellee, which were mailed in Arizona, and thereafter she received from him some flowers, which were sent to her at her son's address in Beloit; that she had never lived in Aurora and had never been in Aurora after her marriage to appellee on November 26, 1927, and had never, at any time, received any notice, letter, or communication of any kind from the Circuit Court of Peoria County in connection with this divorce action.

Louise Ferguson, the wife of a brother of appellant, corroborated appellant as to the several places she had lived since the parties had separated, and testified that she was living, at the time of the hearing, at No. 2329, 17th Avenue, Rockford, and that appellant was living with her at that time, and had been for nine months prior to that time and that appellant was living at 707 1/2 North Court Street in Rockford before she came to live at the home of this witness.

where she remained from October 1, 1961, until January 25, 1962, at which time she went to live with Louise [illegible], the wife of her brother, at No. [illegible] Avenue, Rockford, and has lived there since that time and was [illegible] at the time of the hearing of this petition.

Appellant [illegible] testified that [illegible] of Rockford from [illegible] she left [illegible] until the date of this [illegible], except [illegible] son at Beloit, Wisconsin, [illegible] for several week-end visits, [illegible] Mrs. [illegible] at Beloit, [illegible] was away [illegible] for only one night.

Appellant further [illegible] in [illegible] 707 1/2 North Court Street, [illegible] letters from appellant [illegible] received [illegible] address [illegible] never [illegible] appellant [illegible] 1927, [illegible] notice, [illegible] communication [illegible] Peoria County in connection with [illegible] divorce decree.

[illegible] corroborated [illegible] several [illegible] since the [illegible] at the time of the hearing, at No. [illegible] Rockford, and that appellant was living with her at [illegible] for nine months prior to that time, and that appellant was living at 707 1/2 North Court Street in Rockford [illegible] live at the home of this witness.

Mrs. Ferguson further testified that on May 29, 1962, respondent called her by phone and stated that he wished Mrs. Ferguson would contact his wife and give her some papers to sign. At this point in the proceedings the court inquired of the witness: "Did you tell him where his wife was?" The witness answered: "He didn't ask me." The court then said: "She was living there with you, but you did not tell him?" The witness answered: "No, I did not tell because he didn't ask,sir. If he had asked me, I would have told him." The court then inquired: "What was the nature of the papers. What were the papers about?" The witness answered: "Well, about a farm in Wisconsin. For her to sign some papers. I didn't understand it, but that's what he asked. I was supposed to present her the papers when I came in contact with her. The papers came. I gave them to her. Yes, I did."

Appellee testified that the papers referred to by Mrs. Ferguson was a lease and that he enclosed it with the letter which he sent Mrs. Ferguson to give his wife. This letter was offered and admitted in evidence, and is as follows:

"Aurora, Ill. May 29, 1962.

"Dear Anna:

Sign this if you want to and I will take it up there and see you and get our share. Mack rent it last '61 for $600. I didn't get any, id you?

Yours truly,

Glenn
602 New York. Phone 75600"

Appellee, in response to his counsel's question for an explanation of the statement in his affidavit that the last known address of his wife was 602 New York Avenue, Aurora, Illinois,

testified that this address in Aurora was 602 New York Avenue and that a friend of his, Ike Steward, told him that he saw respondent eating in a Chinese restaurant in Aurora but that he, Steward, did not tell him that respondent ever lived there.

Appellee further testified that on July 20 or 21, 1962, he sent a copy of the divorce decree to George Ferguson, a brother of appellant, thinking that respondent might get it and identified the envelope in which the copy of the decree was mailed. Respondent testified that she did receive a copy of the decree in an envelope which she identified upon the hearing. This envelope was addressed in the handwriting of Appellee, to Anna L. Donath, Rockford, Illinois. The street address "529, 17th Avenue", was lined out with a pencil and "2329, 17th Avenue" written in. It was at this address where appellant was living at the time the complaint for divorce was filed and when the decree was entered. The envelope containing a copy of the decree was postmarked "Chillicothe, Illinois, July 18, 1:00 P. M., 1962".

Appellee further testified that after he and his wife separated he did not know where she lived; that he attempted to find out by asking his daughter-in-law and also Mrs. Ferguson, but they did not tell him. His version of what took place when they separated on September 30, 1960, was that he told his wife he was going away for the weekend, and that she could go and stay with her brother; that he did go away and when he returned home she was not there; but on the following Tuesday, she came back and obtained some of her clothing, and the next Friday she returned and "stripped everything out of the apartment".

The Statute, with reference to service by publication, provides that whenever, in any action affecting property or status, within the jurisdiction of the court, plaintiff or his attorney shall file, at the office of the Clerk of the Court in which his action is pending, an affidavit showing that the defendant resides or has gone out of the state, or on due inquiry cannot be found, or is concealed within the state so that process

cannot be found, or is concealed within the

defendant resides or has come out of

in which his action is pending, an affidavit

attorney shall file, at the

status, within the period

previous suit wh

cannot be served upon him, and stating the place of residence of the defendant, if known, or that upon diligent inquiry his place of residence cannot be ascertained, the Clerk shall cause publication to be made in some newspaper published in the county in which the action is pending. (Ill. Rev. St. Chap. 110, Sec. 14).

The affidavit of plaintiff in the instant case states, (1) that defendant has departed from the State of Illinois, (2) That she is living outside the State of Illinois, at a place to him unknown, and (3) that her last known address was 602 New York Avenue, Aurora, Illinois.

The statute did not require plaintiff or his attorney to state, in the affidavit for publication, the last known Illinois address of defendant but the affidavit stated it was 602 New York Avenue, Aurora, Illinois. This was false and plaintiff knew it was untrue because he testified that he was living at this address in Aurora on May 29, 1962 and the uncontradicted evidence is that defendant was not in Aurora and had never been at this address.

As the affidavit stated that defendant departed from the State of Illinois and was living outside the State of Illinois and at a place unknown to the plaintiff, it was incumbent on plaintiff or his attorney to state, in the affidavit, upon which the publication notice was based, that, upon diligent inquiry, her place of residence could not be ascertained. The affidavit did not so state, and was insufficient. (Spalding v. Fahrney, 108, Ill. App. 602, 604.)

The record discloses that a copy of the publication notice, together with a copy of the complaint was mailed by the clerk on June 15, 1962, addressed to defendant at 602 New York Avenue, Aurora, Illinois. The record does not show that it was ever returned to the clerk but that is not strange because Appellee was living at that address. Respondent testified that she did not receive this notice or a copy of the complaint.

receive this notice or a copy of the complaint.

living at that address. Respondent testified that she did not

turned to the clerk but that it not strong because [illegible] her

Aurora, Illinois. The record does not show that it was re-

tice, together with a copy of the complaint was mailed to the clerk

on June 15, 1962, addressed to defendant at 622 [illegible] in Aurora,

Supp. 602, 604.)

The record discloses that a copy of the publication no-

not so state, and was insufficient. (Goulding v. Dabney, 109, Ill.

place of residence could not be ascertained. The affidavit did

publication notice or praecipe, that [illegible] upon

title or his attorney to state, in the affidavit, what, with

and at a place unknown to the plaintiff, or has departed [illegible]

the State of Illinois and can not after due diligence be found

addressed.

is that defendant was not in Aurora [illegible] at the

dress in Aurora on May [illegible] people in the vicinity

it was untrue [illegible] that [illegible] at this ad-

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Ave., Aurora, Illinois. [illegible] the last known Illi-

to state, in the affidavit [illegible], the last known

[illegible] Aurora, Illinois.

The statute [illegible] plaintiff [illegible] attorney

(1) that defendant is a [illegible] (See [illegible] Ill.

(2) That she is living [illegible] the state of Illinois, at

place to him unknown, and (3) that [illegible] was

not in York Avenue, Aurora, Illinois.

cannot be served upon him, and stating the place of residence of

the defendant, if known, or that upon diligent inquiry his place

of residence cannot be ascertained, the Clerk shall cause publi-

cation to be made in some newspaper published in the county in

which the action is pending. (Ill. Rev. Stat. 1961, Chap. 14).

Respondent did receive a copy of the decree within a few days after it was rendered on July 18, 1962, but delayed until September 24, 1962, before filing her petition in which she prayed that the decree be set aside. In her brief she states that the most important portion of the decree was that part which barred the defendant from getting alimony from the plaintiff, despite the fact that the parties had been married for a period of thirty-five years, and upon oral argument in this court, her counsel stated that appellant was not seriously concerned about the portion of the decree which granted appellant a divorce.

The applicable portion of the Practice Act provides that if any final judgment or decree is entered against any defendant, who has been served by publication with notice of the commencement of the action, and who has not been served with a copy of the complaint, or received the notice required to be sent him by mail, or otherwise brought into court, and he shall within 90 days after notice in writing given him of the judgment or decree, or within one year after the judgment or decree, if no notice has been given as aforesaid, appear in open court and petition to be heard touching the matter of the judgment or decree, the court shall upon notice being given to the parties to said action who appeared therein, set the petition down for hearing and may allow the parties to answer the petition, and if, upon the hearing, it appears that the judgment or decree ought not to have been made against the defendant, it may be set aside, altered, or amended as appears just, otherwise such petition shall be dismissed at petitioner's costs. (Ill. Rev. St. Chap. 110, sec. 50, sub-par. 8).

In order to justify the rendition of a default decree, it must appear that the defendant was served with process as provided by law. The process here was the publication notice, the basis of which was appellee's affidavit. The statements therein were false and known to appellee to be untrue. If there was no proper service the trial court acquired no jurisdiction to enter the decree.(Vancuren v. Vancuren, 348 Ill. App. 351, 357).

Respondent did receive a copy of the decree within a few days after it was rendered on July 18, 1962, but delayed until September 24, 1962, before filing her petition in which she prayed that the decree be set aside. In her brief she states that the most important portion of the decree was that part which barred the defendant from writing alimony from the plaintiff, despite the fact that the parties had been married for a period of thirty-five years, and upon oral argument in this court, her counsel stated that appellant was not particularly concerned about the portion of the decree which granted appellant a divorce.

The applicable portion of the statute [illegible] provides that at any time] judgment or decree is [illegible] decree [illegible], when has been served by publication, [illegible] decree, and who has not appeared therein, [illegible] a copy of the complaint, or [illegible] the party [illegible] personally within this state, or [illegible] into court, and [illegible] decree, or [illegible] his [illegible] decree, if no [illegible] appeal [illegible] are notified to be heard [illegible] the court shall upon notice being given to the parties [illegible] who appeared therein, or the petition [illegible] the parties to answer [illegible] that the judgment or decree [illegible] defendant, it may be set aside, [illegible] otherwise such [illegible] (III. Rev. St. Chap. 110, sec. 50, subsec. 11).

In order to give the provision [illegible] appear that the defendant was served [illegible] The process here was the publication notice, [illegible] appellee's residence. The affidavit here [illegible] appellee to be untrue. It thus [illegible] acquired no jurisdiction to enter the decree.(Thornton v. Thornton, 248 Ill. App. 351, 357).

The law contemplates and requires that every defendant be given the best possible notice of the pendency of suit and it is only where personal service cannot be had that substituted wervice is permitted. (Anderson v. Anderson, 292 Ill. App. 421, 426.)

The order of the Circuit Court of Peoria County dismissing the petition of appellant is reversed and this cause is remanded to that court with directions to enter an order setting aside the decree of July 18, 1962, and for such further proceedings as may appear to be just and equitable.

Order reversed and cause remanded.

McNEAL P., concurs.
Smith J., concurs.

42 IA 335

48868

HELEN KWASNIEWSKI, Appellee, v. GABRIEL BULTINCK, KEENEYVILLE GARAGE, and JOHN DOE, On Appeal of KEENEYVILLE GARAGE, Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

On February 10, 1961 plaintiff filed an affidavit for replevin for a 1959 Lincoln Continental four-door sedan, valued at $3000.00, which she stated had been wrongfully taken and detained by Gabriel P. Bultinck, Keeneyville Garage, and John Doe. She alleged that the car was not being held for any tax, assessment, or fine levied by virtue of any law of the State of Illinois against her property or against her personally, nor was it seized under any execution or attachment against the goods and chattels of plaintiff liable to execution or attachment, nor held by virtue of any writ of replevin against plaintiff. On April 21, 1961 defendant Keeneyville Garage filed its answer in which it averred that at its instance a writ of attachment was issued by Police Magistrate Bultinck, a defendant in the instant suit, and served on Ted Krause, also known as Theodore A. Kwasniewski, husband of the plaintiff, since he had failed to pay a bill in the amount of $451.21 for work done on the car; and that the car was removed from the possession of Ted Krause in accordance with such writ. Keeneyville Garage demanded judgment in the amount of $451.21, plus additional court costs, storage charges, and attorney's fees.

On May 10, 1961 Gabriel Bultinck, in his capacity as a police magistrate, filed his answer in which he stated that he held

the car in custodia legis while he awaited the order of the trial court with respect to the disposition of the chattel, and he submitted the property to the jurisdiction of the court pending outcome of the action. On January 9, 1962, upon trial and after extensive examination of the parties, the trial court entered an order finding that the repair bill was just, that the car was seized lawfully on the writ of attachment, and that defendant Keeneyville Garage was in lawful possession of the vehicle; and the court rendered judgment for that defendant.

On April 5, 1962 plaintiff filed her petition representing that the repair bill had not been paid, that it was just, that the car was seized lawfully on the writ of attachment and accordingly the trial court found defendant to be in lawful possession of the vehicle and rendered judgment in its favor, and that on March 8, 1961 judgment had been entered by Police Magistrate Gabriel P. Bultinck in favor of Keeneyville Garage and against Ted A. Krause in the sum of $451.21 and costs, which judgment was the subject matter of the repair bill that the trial court found to be just. She tendered in open court the sum of $451.21, together with costs, and asked that orders be entered allowing her to deposit that sum, together with court costs, with the clerk of the court, and directing Keeneyville Garage to turn over the Lincoln automobile to plaintiff. On April 30, 1962 the corporate defendant filed its answer in which it asked that the court deny plaintiff leave to deposit $451.21 plus court costs, and asked alternatively that the court assess plaintiff for storage fees and attorney's fees from the date of the seizure of the vehicle on January 13, 1961 to the date of the answer, plus the repair bill of $451.21, plus court costs involved in the seizure of said vehicle

by writ of attachment on January 13, 1961, and court costs incurred in the instant suit and an additional Circuit Court suit (the judgment of March 8, 1961 had been appealed on a writ of certiorari and the case was still pending in the Circuit Court), and it asked additionally that the court dismiss the certiorari proceeding in the light of the judgment of January 9, 1962. On May 7, 1962 the trial court found that the corporate defendant was in possession of the car pursuant to a writ of attachment, that no storage charges were due defendant, that judgment in the amount of $451.21, together with court costs, had been rendered against plaintiff and was unpaid, that plaintiff tendered the sum of $451.21, plus costs, in open court, in accordance with the judgment due. The court ordered that the corporate defendant return possession of the car to plaintiff within five days from the date of the order pursuant to the tender of money in open court; that no storage charges or attorney's fees be assessed against plaintiff; and that the tender of $451.21 and costs be held by the clerk of the court. On May 7, 1962 plaintiff deposited her tender of $451.21 with costs with the clerk of the court. The corporate defendant is still in possession of the car and still refuses to comply with the order of court to release it to plaintiff. It appeals from the order, and has filed a supersedeas bond which was approved by the court on June 5, 1962.

Although this suit is treated by the parties as a replevin proceeding, it is in fact an action of detinue. The common-law action of detinue differs from statutory action for claim and delivery, or replevin, in that,in the former,possession of the property is not sought by or given to the plaintiff pending the action, whereas,in the latter,the plaintiff may claim, and upon compliance with statutory provisions be awarded, possession at the

commencement of the action. The trial judge evidently treated the action as in detinue because he found, after trial, that the corporate defendant rightfully held the auto under the attachment and that plaintiff owed defendant $451.21 for services. In this instance it is conceded that $451.21 is due Keeneyville Garage for repairs made on plaintiff's car, and this amount is on deposit with the clerk of the Circuit Court. The corporate defendant is at liberty to collect this amount whenever it chooses to do so on condition that it return the car to plaintiff-owner.

This entire controversy arises over the refusal of the court to allow storage charges and attorney's fees. There was no proof with respect to the storage of the car either as to the reasonableness of the charges claimed or the length of time that the car was stored, and there is no statutory provision for the allowance of attorney's fees under the circumstances of this case.

Accordingly we hold that the trial court properly denied the corporate defendant's claim for storage charges and attorney's fees; and in all other respects, as well, the order of the Circuit Court is affirmed.

ORDER AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

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ANTHONY W. ROSINIA and ANNE E. ROSINIA, Plaintiffs-Appellants,	)	APPEAL FROM MUNICIPAL COURT
v.	)	
G.A. BROWN and J.W. KERR, Individually and d/b/a BROWN AND KERR, Partners, Defendants-Appellees.	)	OF CHICAGO

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order of the Municipal Court of Chicago entered on February 8, 1962 vacating default judgments of November 10, 1961 and November 14, 1961 entered against defendants G.A. Brown and J.W. Kerr respectively. On June 6, 1962 this court dismissed a previous appeal by appellants on the ground that the order vacating the default judgments was not a final, appealable order in that in a multiple party suit a court may enter a final order against fewer than all the parties only upon an express finding that there is no just reason for delaying enforcement or appeal. (Ill. Rev. Stat. Ch. 110, § 50(2)). The appeal was dismissed because Brown and Kerr, Inc., an Illinois corporation, was a party to the suit; there was no default judgment against Brown and Kerr, Inc.; and, therefore, an express finding that there was no just reason for delaying enforcement or appeal was necessary.

On July 16, 1962, the lower court entered an amending order that there was no just reason to delay enforcement or appeal of the order of February 8, 1962. Since this has been done we feel that the order of February 8, 1962 is now a final order and the appeal is properly before us.

The motion of the appellees that the appeal be dismissed is denied. The motion of appellees for reasonable attorney's

fees in defending this appeal is also denied. The general rule is that damages may not be awarded to attorneys for defending an appeal unless the appeal be made for delay and not in good faith. Minnesota Mutual Life Insurance Co. v. Link, 230 Ill. 273, 82 N.E. 637; Bradley v. Federal Life Insurance Co., 178 Ill. App. 524. This is not the case here. Appellants' default judgments have been vacated. They believe that Section 72 of the Civil Practice Act has made those judgments invulnerable. They have been denied a hearing on the merits of that contention once for lack of a final judgment.

Appellants' theory of the case is that the court lost jurisdiction to vacate the default judgments after the expiration of 30 days except by a good and sufficient motion under Section 72 of the Civil Practice Act (Ill. Rev. Stat. Ch. 110, § 72), which must show lack of negligence and a meritorious defense. Appellees' theory continues to be that the default judgments of November 10 and November 14 respectively were not final judgments for the purpose of triggering the 30 day limitation of Section 72 due to the fact that since multiple parties are involved in the litigation the default judgments of November 10 and 14 were not final judgments without an express finding "that there is no just reason for delaying enforcement or appeal" under Section 50(2).

The judgments were not final when vacated because the court adjudicated the rights and liabilities of fewer than all the parties. The amending order of July 16, 1962 does not affect the validity of the order of February 8, 1962 vacating the default judgments because when the order of February 8, 1962 was entered the court had plenary jurisdiction. See Section 50(2) and Section 50(6) Civil Practice Act. The thirty day period under

Section 50(6) did not begin to run until July 16, 1962; when the amending order was entered.

In the case of Ellman v. DeRuiter, 412 Ill. 285, the Supreme Court dealt with a similar situation. In that case defendant was defaulted and judgments were entered against him in favor of plaintiffs. More than thirty days after the date upon which the judgments were entered defendant filed a motion supported by affidavits. The mistakes of fact warranting the affirmance of the order vacating the default judgment were an erroneous entry made by the docket clerk of defendant's attorney, and the fact that attorney for the plaintiffs, without notice to defendant or his attorneys, appeared in the county court and secured default judgments which were entered against the defendant. There, as in the present case, counsel for the plaintiff without revealing that default judgments had already been entered, represented that for one reason or another he was not ready to proceed upon the date set for settlement negotiations (here, to argue motions) within the thirty day period.

When Ellman v. DeRuiter was before the Appellate Court, that court stated: "However lacking in fairness the conduct of plaintiffs' counsel in the Municipal Court . . . may have been, such conduct is not ground for vacating the judgments on defendant's petition." The Supreme Court pointed out that the Appellate Court decided as they did only because they thought they lacked the power to vacate after the termination of the 30 day period under the statutory motion which has been substituted

for the writ of error coram nobis. The court then analyzed the history of the writ and stated at page 291:

> "Similarly, common-law treatises do not mention fraud or excusable mistake as sustaining a writ of error coram nobis, but such grounds have been declared sufficient to support the equivalent motion in the modern practice in this State where the fraud or mistake has the effect of preventing the litigant from making his defense. (McKiernan v. Taylor & Lynch Cartage Co., 263 Ill. App. 657; Smyth v. Fargo, 307 Ill. 300.)"

In conclusion the Supreme Court stated at page 293:

> "While there was no duty on the attorney to notify defendant of the default judgments, fair dealing would require that he inform defendant of the defaults when the question arose instead of pursuing a course calculated to keep the defendant in ignorance until the time he could make a direct attack on the judgments had expired."

The trial court found that the action of appellants in continuing the date of hearing on November 28, 1962 and the failure then to give notice of the outstanding default judgment was sufficient to warrant vacating of the default judgments. We agree with the position of the lower court.

Lest our reliance upon but one case seems misplaced we call attention to Dann v. Gumbiner, 29 Ill. App.2d 374, decided by the First Division of this court, wherein it was stated at page 380:

> "Since Ellman v. DeRuiter, 412 Ill. 285, we believe the pattern of liberality in vacating default judgments in term time has been definitely expanded to include proceedings brought under section 72 [Ill. Rev. Stat. 1959, Ch. 110, §72], to set aside default judgments entered more than 30 days prior to the filing of the petition to vacate such judgments. All prior decisions relating to proceedings of this character must now be reconsidered in the light of Ellman v. DeRuiter."

Accordingly, the order of February 8, 1962 is affirmed and the case is remanded with directions to proceed on the merits.

ORDER AFFIRMED AND CAUSE
REMANDED WITH DIRECTIONS

BURKE, J., and FRIEND, J., concur.